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No. 88-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

METROMEDIA, INC., *et al.*,

Petitioners,

v.

APRIL ENTERPRISES, INC.,

Respondent.

REPLY MEMORANDUM

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California Constitutional and Statutory Provisions:

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Cal. Civ. Code Ann. § 3294, *as amended* 1,4

Cal. Civ. Code Ann. § 3295, *as amended* 1

REPLY MEMORANDUM

The primary submission of respondent, April Enterprises, Inc. ("April"), in its Opposition is that the Court should allow some unspecified but presumably substantial amount of time to pass before involving itself directly in the resolution of the important constitutional questions presented by petitioners ("Metromedia"). The proposed delay serves April's interests and those of other plaintiffs seeking punitive damages in California because, as April repeatedly argued to the California courts in this case, these questions continue to be resolved in favor of the punitive damage regime by a California court system that no longer pauses to consider them seriously. April's arguments, however, and many of the authorities upon which it relies in its Opposition, fortify Metromedia's contention that this Court must act now to resolve these questions.

1. The California Legislature Has Failed to Address and Resolve These Important Questions

Almost one and one-half years after this Court's decision in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), California enacted a law amending §§ 3294 and 3295 of the *Civil Code*, provisions that in April's words "entirely govern[]" "[c]laims for punitive damages in California . . . ." Opp., at 13. April asserts this new law has the affect of "revamping and restricting punitive damage law" in California. Opp., at 12. This new law, however, does not resolve *any* of the problems to which Metromedia's constitutional questions are addressed. It perpetuates California's system of unlimited punitive damage awards. It does not confer on defendants subjected to multi-

million dollar punitive damage awards the minimal procedural rights enjoyed by persons accused of more serious wrongdoing in California. It does not address the increasingly serious problem of the excessiveness of punitive damage awards in California or otherwise attempt to relate the size of such punishments to the overall statutory system of punishments presently prescribed for wrongdoers in California. If the California legislature has been, as asserted by April, "one of the most active legislatures in the nation with respect to enacting statutes regulating punitive damages," Opp., at 12, then there seems little reason to believe that legislative relief will be forthcoming to alter a system that has flourished for many years with the implicit blessing of that institution.

2. The California Courts Have Not Responded to This Court's Decisions in Aetna and Bankers Life

As Metromedia demonstrates in its Petition, its raising of state[1] and federal constitutional challenges to this $14,000,000 punitive fine in the trial court, Court of Appeal and Supreme Court of California

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[1] April erroneously suggests, Opp., at 16-17 & n.18, that Metromedia did not adequately press its state constitutional law objections to this punitive damage award in its brief on appeal, claiming that in that brief Metromedia relied only on California's equal protection clause, Art. I, § 7. However, and as Metromedia has documented, Pet. for Cert., App. F, 39a-43a, Metromedia invoked California's excessive fines clause, Art. I, § 17, as well as Art. I, § 7, expressly in its submission to the trial court. In its brief in the Court of Appeal, App. G, 46a, Metromedia made specific reference to its submission to the trial court and stated that its objections remained the same. This articulation was more than adequate under the decision in *Hale* v. *Morgan*, 22 Cal. 3d 388, 149 Cal. Rptr. 375, 584 P.2d 512 (1978), as discussed in the text below at pp. 7-9.

generated only a one paragraph response from the Court of Appeal and the vote of Chief Justice Lucas to hear this case. Thus, the reaction of the California judiciary to this Court's decisions in *Aetna* and *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645 (1988), has been imperceptible.

Without any concrete evidence that the California courts have even read *Aetna* or *Bankers Life*, April now argues to this Court that the California courts "realize . . . that these issue are complex, extremely serious and far-reaching" but that those courts "need time to respond." Opp., at 4. This argument is particularly curious in light of April's consistent position in the California courts in this case, documented thoroughly in Metromedia's Petition, at 7-9, 18 & 19 n.9, that these issues were of no importance because "the California Supreme Court (as well as every lower California appellate court) has consistently rejected precisely the arguments resurrected by [Metromedia]." Pet. for Cert., at 7, *quoting* April's brief on appeal in the Court of Appeal. April pressed this argument in the Court of Appeal after the decision in *Bankers Life* came down and, in the Supreme Court of California, April argued that, in light of *Bankers Life*, "[o]nly a jurisprudential somnabulist could miss the point" that this Court had, in *Bankers Life*, "returned this area of the law to the states" free from federal constitutional control. *See* Answer to Pet. for Rev., App., *infra*, 5a.

April's argument is also misplaced because the California appellate courts *had* the time and opportunity to respond to *Aetna* and *Bankers Life* in this case. Metromedia vigorously attempted to elicit a response, Pet. for Cert., at 8-9, 18-19 & n.9, to no avail. Fur-

thermore, it is not particularly surprising that the very state court system that created the rights and punitive damage remedies for perceived social wrongs as illustrated by this case would be reluctant to place state or federal law restraints on the exercise of that breathtaking power. In this case, Metromedia has been assessed punitive damages for exercising an express contracutal authorization that the California courts not only construed as a prohibition but also burdened with a $14,000,000 punitive sanction in the face of an express statutory prohibition of punitive damages for breach of contract.[2]

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[2] The 1965 contract between Metromedia and April unequivocally authorized Metromedia to erase the videotapes without April's consent six months after broadcast. Metromedia erased the tapes several years after broadcast and two years after Metromedia had given notice to April of its intention to do so.

The California courts contrued the 1965 contract as containing an implied covenant not to erase the tapes despite the clear contractual provision to the contrary. Those courts also characterized the contract as consistent with a joint venture notwithstanding express contractual language making April an independent contractor. This latter feat of judicial legerdemain permitted those courts to uphold the $14,000,000 punitive damage award for the breach of an implied contractual provision despite the plain language of *Cal. Civ. Code* § 3294, which authorizes punitive damages only in cases of the breach of an obligation *not* arising from a contract.

The Court of Appeal acknowledged in its initial decision in this case that the 1965 contract between Metromedia and April, "[t]aken literally, . . . would allow [Metromedia] to erase a videotape either at the time [April] was negotiating a syndication agreement, or after such an agreement had been reached." App. A, 5a. In its Opposition, April suggests, Opp., at 1, that Metromedia's rights under the 1965 contract to erase the tapes were terminated by a 1968 contract. The decision of the Court

In the face of this judicial indifference toward this Court's suggestions that punitive damages may violate constitutional rights, April's argument, Opp., at 18-22, that this governmentally sponsored system of administering punishment is working just as it should refutes its contention that either the California legislature or the California courts may be expected to bring this system under control. The $14,000,000 penalty in this case—$4,000,000 more than April even dared to request in its prayer—is dramatic evidence of a system that is out of control. App. F to April's Opposition, which demonstrates an explosion of punitive damage awards in *reported* cases in California in the 1980s, is equally dramatic evidence of the situation in California.[3]

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of Appeal, however, was not based upon that 1968 contract; indeed, that court expressly declined to resolve the disputed question whether that 1968 contract "ever took effect." App. A, 10a.

[3] April attaches, as App. F. to its Opposition, a chart of some seventy-one "available" opinions "in which the excessiveness of a punitive award was examined." In the first place, that chart may or may not reflect accurately the affirmance of punitive damage awards by the California courts. For example, that chart, if updated, would presumably not include the case at bar because the $14,000,000 punitive fine here was affirmed in an unpublished opinion. In April's "Answer" to Metromedia's Petition for Review filed in the Supreme Court of California, it discussed another unpublished opinion of the California Court of Appeal affirming a $15,000,000 punitive damage award on July 19, 1988. There is no system in California to report or record the number or size of such punitive damage awards that are affirmed in unpublished opinions.

Second, April's chart demonstrates that between 1922 and 1959, the highest punitive damage award affirmed by the California courts was $10,000; in the 1960s, the highest was

3. The "Record" in This Case Fully Presents the Constitutional Questions

April argues that the "record" in this case is deficient for purposes of this Court's decision of the constitutional questions presented. April advances a series of procedural arguments regarding the presentation of these questions to the California courts and also argues that the lack of a "reasoned" decision by the California courts on these questions in this case should preclude review by this Court. These arguments were largely anticipated in the Petition and merit only a brief response.

a. Metromedia Did Not "Waive" Its Constitutional Rights in the Trial Court

Although April joined issue on these constitutional issues in the California courts, April advances in this Court the argument that Metromedia "waived" its asserted constitutional rights by suggesting to the trial court an instruction on punitive damages which was never given by that court. This argument was anticipated in the Petition, at 9 n.3, and warrants only two additional observations. First, April's argument does not even purport to respond to Metromedia's initial submission on this issue, *id.*, other than to concede, Opp., at 8, Metromedia's point that these constitutional questions were for the courts, not the

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$250,000; in the 1970s, the highest was $740,000. In the 1980s, the size and frequency of punitive damage awards increased dramatically, with affirmance by the Court of Appeal of punitive awards of up to $3,000,000 by 1986. The punitive damage awards affirmed on April's chart from 1922 through 1979, in the aggregate, total less than $3,750,000. That figure is less than the total on April's chart for the years 1980-81. And it is less than one-third the amount awarded against Metromedia in this case.

jury, to decide. How the jury was instructed is simply irrelevant to the proper raising of these constitutional questions by Metromedia.

Second, April does not contest Metromedia's argument, Pet. for Cert., at 9-10 n.3, that at least five decisions of the California appellate courts establish a California practice allowing presentation of these very questions for the first time at the post-trial or appeal stage. April cannot do so. In fact, April itself brings to this Court's attention (albeit for a different purpose) a decision of the Supreme Court of California that is irreconcilable with April's "waiver" argument.

In *Hale* v. *Morgan*, 22 Cal. 3d 388, 149 Cal. Rptr. 375, 584 P.2d 512 (1978), cited in the Opposition, at 16-17, a defendant in a civil action had been penalized under a statute imposing a $100 per day fine on landlords for wilfully depriving a tenant of utility services. Before the trial court, the defendant had argued that the application of that statute to him would constitute a "great injustice," but did not otherwise challenge the constitutionality of that statute. On appeal to the Supreme Court of California, the defendant raised for the first time various specific constitutional challenges to the statute and the fine imposed under it, including a challenge under the California Constitution's prohibition on excessive fines. The plaintiff argued that those challenges could not be raised in the Supreme Court of California because they had not been adequately raised in the trial court.

The rejection of the plaintiff's "waiver" argument in *Hale* was clear and unequivocal:

While " 'It is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived' " (*Jenner* v. *City Council* (1958) 164 Cal. App. 2d 490, 498 [331 P.2d 176]), application of this principle is not automatic. Because the central issue before us is the propriety of very substantial *penalties* we interpret liberally defendant's attempts to raise error in a penal context. (Cf. *People* v. *Bolinski* (1968) 260 Cal. App. 2d 705, 722 [67 Cal. Rptr. 347].) The record before us discloses that defendant urged before the trial court that enforcement of section 789.3 under the circumstances would be a "great injustice." We find at least arguable merit in defendant's assertion that constitutional issues were thereby adequately raised below.

Furthermore, even if the issue had not been properly presented to the trial court, we may nonetheless examine the validity of the statute under which penalties herein have been assessed. We have held that a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts . . . . Moreover, although California authorities on the point are not uniform, our courts have several times examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved . . . , the asserted error fundamentally affects the validity of the

> judgment . . . , or important issues of public policy are at issue . . . .

22 Cal. 3d, at 394 (citations omitted; emphasis in original). The decision in *Hale* cannot be squared with any aspect of the spurious "waiver" argument advanced by April.

b. The Absence of a "Reasoned Opinion" Provides No Basis for Denial of Metromedia's Petition

April argues that the absence of any opinion in this case on the merits of these important constitutional questions from the Supreme Court of California and the limited treatment of Question 3 by the Court of Appeal in an unpublished opinion should preclude review of this case in this Court. Opp., at 14-15. What April does not attempt to explain to this Court is why any California court should be expected to produce such a "reasoned opinion" in light of April's repeated contentions in those courts that these issues have long since been resolved against Metromedia in other, published opinions of the California appellate courts. Indeed, in the Supreme Court of California April argued that, "[f]ew issues have so decisively, definitively and repeatedly been established as law in California than the constitutionality of punitive damages." April's Answer to Petition for Review, at 16, *reprinted in* App., *infra*, 2a. April supported this argument by citation to fourteen cases which April presumptively regards as "reasoned." It is clear that only in this Court can defendants exposed to punitive damage awards in California secure review of those fourteen decisions and the case at bar.

Moreover, it would be anomalous and certainly inconsistent with this Court's reference in *Bankers Life*

to a "reasoned opinion" for the California courts to defeat review of these important constitutional question in this Court simply by refusing to review these questions at all, much less to fail to produce a reasoned opinion regarding them.[4]

4. Conclusion

Metromedia stands punished in this case because it failed to anticipate that, more than two decades after it bargained for a written contract with April that authorized it to erase the videotapes created by April and Metromedia, the California courts would override legislative prohibitions on punitive damages for deviations from contractual obligations and punish Metromedia with a $14,000,000 fine for its exercise of that express contractual authority. April, the recipient of this windfall, offers no plausible basis upon which this Court can refuse to examine the federal constitutional rights of Metromedia and others in California and elsewhere who find themselves exposed to such a capricious and arbitrary system of administering punishment.

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[4] As Metromedia points out in its Petition, at 19-21, the Supreme Courts of Minnesota and Alabama and the Tenth and Eleventh Circuits have, subsequently to this Court's decision in *Bankers Life*, affirmed multi-million dollar punitive damage awards without any serious consideration of the constitutional objections raised by the defendants in those cases. Just yesterday, the Supreme Court of Nevada joined this array by reversing a trial court's grant of a judgment n.o.v. and ordering judgment on a $5,939,500 punitive damage award in an eleven-page opinion that did not even address these same constitutional challenges as raised by the defendant in that court both before and after *Bankers Life* came down. *Ainsworth* v. *Combined Insurance Company of America*, No. 17625 (Nev. Oct. 26, 1988).

October 27, 1988

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

APRIL ENTERPRISES, INC.,
Plaintiff/Respondent,

v.

KTTV and METROMEDIA, INC.,
and DOES 1 through 50, inclusive,
Defendants/Appellants.

ANSWER TO PETITION FOR REVIEW

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION SEVEN

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* * * * * *

[—16—]

C. On At Least Fourteen Occasions This Court, And Various California Courts Of Appeal, Have Ruled That Civil Code Section 3294 Is Constitutional, And The United States Supreme Court Has Definitively Expressed Its Intention Not To Get Involved In The Issue. Few issues have so decisively, definitively and repeatedly been established as law in California than the constitutionality of punitive damages. Suffice it to say that, in at least fourteen published decisions, [—17—] the defendant raised, and the Court rejected, constitutional challenges to section 3294.[11]

What was said 111 years ago also rings true today—and with 111 years' greater force:

> "But the rule [of punitive damages] was adopted as long ago as 1854 and has been repeatedly

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[11] *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819-820.

Hasson v. Ford Motor Co. (1982) 32 Cal.3d 388, 403.

Bertero v. National General Corp. (1975) 13 Cal.3d 43, 67.

Peterson v. Superior Court (Thompson) (1982) 31 Cal.3d 147, 160.

Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757. Justice Kaufman specifically concurred in the determination that punitive damages passed constitutional muster (*Id.* at p. 836).

Wetherbee v. United Ins. Co. (1971) 18 Cal.App.3d 266.

Downey Sav. & Loan Assn. v. Ohio Cas. Ins. (1987) 189 Cal.App.3d 1072. Justice Kennard sustained the $5,000,000 award, constitution 2% of the defendant's wealth and a 32-to-1 ratio to compensatory damages.

Zhadan v. Downtown L.A. Motors (1976) 66 Cal.App.3d 481, 501-502.

Toole v. richardson-Merrell Inc. (1967) 251 Cal.App.2d 689, 716-717.

Gibson v. Gibson (1971) 15 Cal.App.3d 943, 949.

Fletcher v. Western National Life Ins. Co. (1970) 10 Cal.App.3d 376, 404-405.

Multiplex Ins. Agency v. California Life Ins. Co. (1987) 189 Cal.App.3d 928.

Maheu v. Hughes Tool Co. (9th Cir. 1978) 569 F.2d 459.

> affirmed since. It is therefore too late to overturn it by judicial decision. That could well be done now by legislative enactment only." *Bass v. Chicago & N.W. Ry.* (1987) 42 Wis. 654, 672.

The effect of stare decisis on constitutional issues was examined by this court in *Scovill Manufacturing Co. v. Skaggs Pay Less Drug Stores* (1955) 45 Cal.2d 881, where the defendant challenged the constitutionality of fair trade laws. The court responded as follows:

> "Nothwithstanding the division of opinion in the Max Factor case the decision in that case upholding the statute *has been the established law of the state for nearly twenty years and in the orderly administration of justice should be deemed controlling until otherwise provided by duly enacted legislation.* See County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal.2d 378, 392, 196 P.2d 773." (Emphasis added.)

[—18—] Similarly, Petitioner's "public policy" arguments, especially in light of our legislature's recent decision to extensively amend and maintain Section 3294, must fail.

> "Under the fundamental doctrine of the separation of powers, restated in 1972 in article III, section 3 of the California Constitution, *a statute is not subject to objection on the ground that it contravenes public policy. As a legislative enactment it becomes public policy." English v. Marin Municipal Water District* (1977) 66 Cal.App.3d 725, 730. (Emphasis added.)

Our federal Supreme Court also has a long history of upholding the constitutionality of punitive damages.

> "[I]f repeated judicial decisions [as to punitive damages] for more than a century are to be received as the best exposition of what the law is,

> the question will not admit of argument." *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851).

The nation's highest court has also affirmed the constitutionality of punitive damages in the following decisions: *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); *United States* ex rel. *Marcus v. Hess*, 317 U.S. 537 (1943); *Bell v. Preferred Life Society*, 320 U.S. 238 (1943). United States Supreme Court precedent has not been lost on our appellate courts either.

> "[T]he Eighth Amendment applies only to criminal actions, not to purely civil penalties, as involved herein. (*Ingraham v. Wright* (1977) 430 U.S. 651, 664, 97 S.Ct. 1401, 1408, 51 L.Ed.2d 711; *Zwick v. Freeman* (2d Cir. 1967) 373 F.2d 110, 119)." *Downey Savings & Loan Assn. v. Ohio Cas. Ins., supra*, 189 Cal.App.3d at 1101.

> "The United States Supreme Court has considered and rejected arguments similar to those now urged upon us." (Citing *United States v. Regan*, 232 U.S. 37, 4 S.Ct. 213, 58 L.Ed. 494.) *Toole v. Richardson-Merrell Inc., supra*, 251 Cal.App.2d 689, 717.

Petitioner's attempt to find some measure of comfort for its position in the May 16, 1988, decision in *Banker's Life and Casualty Co. v. Crenshaw*, 56 U.S.L.W. 4418 (U.S. May 16, 1988), is ironic indeed. In a [—19—] crescendo of anticipation, commencing with the court's enticing invitation in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-829, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), and culminating with *Banker's Life* and six other cases presenting the identical issue, those who follow the issue waited breathlessly for our high court to act. Then, on May 16, 1988, the court issued its opinion in *Banker's Life* and declined to get involved, expressly leaving resolution of the issue to the state courts and state legislatures. If

there was any ambiguity whatsoever in the court's action, it was clarified with acute definitiveness two weeks later when it *dismissed all six of the other state cases presenting the constitutional issue, thereby leaving affirmed punitive awards ranging from 3.5 to 10 million dollars.* (See Los Angeles Times, June 1, 1988, report). One of these six cases, denied review by the United States Supreme Court, was the California decision in *Downey Savings & Loan Assn. v. Ohio Cas. Ins. Co., supra,* 189 Cal.App.3d 1072, in which the constitutional issues were, unquestionably, properly and timely presented.

Only a jurisprudential somnambulist could miss the point. Despite Petitioner's clever patchwork summary of the prelude to *Banker's Life,* the United States Supreme Court has returned this area of law to the states. In our state, the precedential history of the constitutionality of punitive damages—from the enactment of section 3294 in 1872 to *Peterson* in 1982 and *Downey Savings* in 1987—is simply overwhelming.

* * * * * *